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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 9.2002

By Hand Delivery

Secretary Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street. S.W.
Room TW-A325
Washington. D.C. 20554

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991—CG Docket No. 02-278, CC Docket No. 92-90, FCC 02-050

Dear Secretary Dortch:

This comment letter is submitted on behalf of Visa in response to the Notice of Proposed Rulemaking issued by the Federal Communications Commission ("FCC") regarding the Telephone Consumer Protection Act ("TCPA") of 1991. We appreciate the opportunity to comment on this issue.

The Visa Payment System, of which Visa U.S.A.' is a part, is the largest consumer payment system in the world, with more volume than all other major payment cards combined. Visa plays a pivotal role in advancing new payment products and technologies to benefit its 21,000 member financial institutions and their hundreds of millions of cardholders worldwide.

Although Visa generally supports the concept of a national "do-not-call" list. as the comments set forth in this letter demonstrate. there are significant constitutional. statutory and practical issues that need to be resolved before any such list can be put in place. Moreover, it is essential that there be only a single national do-not-call list that is subject to a single set of rules at both the state and federal level. In this regard, Visa notes that the Federal Trade Commission ("FTC") has proposed to establish a national do-not-call list under the Telemarketing Consumer Fraud and Abuse Prevention Act ("TCFAPA"). Visa believes that the TCPA, the basis on which the FCC requests

[1] Visa **U.S.A.** is a membership organization comprised **of** U.S. financial institutions licensed to use the Visa service marks in connection with payment systems.

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comment. represents a far more definitive statement of congressional intent with respect to the establishment of a national do-not-call list than the TCFAPA. The TCPA should form the basis of any federal effort to establish a national do-not-call list. Accordingly. Visa urges that the FCC coordinate with the FTC regarding the creation of any national do-not-call list and encourages the FTC to defer or forego action on a national do-not-call list, pending resolution of the important issues identified by the FCC through this comment process under the TCPA. In order to avoid a proliferation of do-not-call lists at the state level. Visa also urges the FCC to exercise preemption of such state laws as contemplated by the TCPA to the maximum extent possible.

Visa's comments on the need for a single national do-not-call list and the constitutional, statutory and practical considerations are set forth below.

A. A Single National Do-Not-Call List

The establishment of a single national do-not-call list holds the potential to provide convenience for those consumers who wish to place a broad limit on telemarketing calls and to facilitate the operations of telemarketers to the extent that they can rely on that list as both an accurate and an exclusive list. Telemarketers should not be forced to adapt their practices to differing requirements on a state-by-state basis. For example, a single national do-not-call list could provide an efficient and manageable working environment for businesses that engage in telemarketing, as well as for companies that simply use the telephone to communicate with their existing customers. Additionally, a single national standard would afford adequate protection to consumers by avoiding inconsistent procedures that may result in errors and by minimizing the cost of providing do-not-call protections to consumers—costs that ultimately will be borne by the consumers who choose *not* to opt out of receiving telemarketing calls.

At the same time. the creation of a national do-not-call list raises important issues that may be difficult to resolve. Any such list is likely to be both over and under inclusive with respect to the preferences of individual consumers. Such a list also must take into account the interests of callers in protected speech. In addition, the potential economic consequences of erring in the creation of such a list for both businesses. in terms of potential lost sales, and consumers, in terms of potential lost opportunities. are substantial. There is evidence that do-not-call requirements have a significant adverse effect on sales. This evidence indicates that consumers themselves cannot accurately predict the calls that they wish to receive. It is hard to imagine that many consumers will reject an attractive offer for a product or service that they wish to acquire simply because it is offered to them over the telephone. These factors alone argue for the creation of a single list. Furthermore, the practical difficulties and confusion for both businesses and consumers that would result from multiple federal and multiple state lists would be significant.

More fundamentally. we cannot imagine that Congress could possibly have contemplated that two federal agencies would create separate national do-not-call lists or separate exceptions from, or procedures for, such lists. This conclusion is reinforced by the obviously differing focuses of the acts under which the FTC and the FCC are proceeding. The TCFAPA is focused on deceptive and abusive practices. The congressional findings in the TCFAPA concentrate on fraud. The TCFAPA does not specifically address, or even mention. the creation of a national do-not-call list. In contrast, the TCPA specifically addresses the issue of protecting the right of consumers to avoid receiving unwanted telephone solicitations through a national do-not-call list. Further, the TCPA establishes factors that the FCC must consider in achieving this protection. Specifically, the TCPA addresses the possible creation of a national do-not-call list and establishes specific criteria for determining whether and how any such do-not-call list would be created. Clearly Congress contemplated that any such list would be created under these criteria with the benefit of the expertise of the agency to which the TCPA is addressed.

As previously noted, however, the FTC already has solicited comment on a national do-not-call list, and that proposal also addresses other aspects of telemarketing. some of which may be appropriately addressed under the TCFAPA. In this regard, the differing substantive focuses of their respective statutory directives suggest that the FCC should lead any consideration of a national do-not-call list, while the FTC should concentrate on those aspects of its proposal that deal with abusive or deceptive telemarketing practices. In any event, in order to prevent two conflicting lists. or conflicting standards applicable to lists, and to ensure that any single list that is established under the criteria specified by Congress for such lists, Visa believes that the FCC should coordinate with the FTC as to the timing and content of any final rules concerning **a** national do-not-call list. Specifically, the FCC should encourage the FTC to defer or forego any action on a national do-not-call list, or any aspects of the FTC proposal that relate to a do-not-call list, pending resolution of issues raised by this comment process.

B. Preemption

In addition to multiple agencies addressing do-not-call lists at the national level. several states are pursuing or maintaining their own telemarketing statutes. The TCPA provides a standard for preemption of state law that permits states to adopt more restrictive requirements or regulations only on an *intrastate* basis.[2] This provision clearly demonstrates that Congress intended to preempt the field with respect to *interstate* calls, and that any application of a state do-not-call list to interstate calls would be preempted. Visa urges the FCC to clarify that the TCPA and any FCC rules adopted under it take precedence over state do-not-call statutes with respect to interstate calls—whether or not

[2] **47 U.S.C.§ 227(e)(1)**

there is any conflict between the TCPA and the FCC's implementing rules and any specific state law regarding this subject.

C. Constitutional Considerations

If a national do-not-call list for telephone solicitations is ultimately created. such list must be guided by the principles applicable to government regulations of commercial speech established in *Central Hudson Gas & Elec. C'orp. v. Public Service Commission ("Central Hudson").*[3] Under *Central Hudson,* restrictions on constitutionally protected commercial speech must pass a three pronged test. The state must assert a substantial governmental interest, the restriction must directly advance that interest and the restrictions cannot survive if the governmental interest could be served as well by a more limited restriction on commercial speech. In the context of a do-not-call list, if the interest to be protected is freedom from unwanted telephone calls, the fashioning of an appropriate scope for such a list is critical under *Central Hudson.* If the limitation on telephone solicitations are addressed too narrowly, for example, a court may find that the list does not directly advance the interest to be protected because it allows too many unwanted calls. At the same time, if the list prohibits calls that consumers wish to receive, the government interest would be served as well by a more limited restriction. and the list would not meet the third *Central Hudson* test.-The difficulty of establishing the appropriate scope of the calls addressed by the list is compounded because the personal preferences of consumers who would consider placing their names on the list may vary greatly with respect to the types of calls that consumers do, or do not, wish to receive.

The TCPA authorizes the FCC to consider the creation of a single national database comprised of residential subscribers who object to receiving telephone solicitations. The *Central Hudson* standard mandates, however, that there be a substantial government interest achieved by any such restriction on commercial speech. More specifically, as applied to a national do-not-call list addressing commercial telemarketing calls, the FCC would need to demonstrate a substantial government interest in the creation of a single list. Therefore, if the FCC deems the establishment of a national do-not-call list to be appropriate for the protection of individual privacy within the context of the TCPA, the FCC will need to define the privacy interest involved. In particular, it is incumbent on the FCC to explain why that privacy interest is only violated by commercial calls, **as** opposed to telemarketing calls from nonprofit organizations. which are exempt under the TCPA definition of a telephone solicitation. For example, if the mere ringing of an individual's telephone is determined to intrude on one's privacy. then the FCC would have to demonstrate how a national do-not-call list addressing commercial calls resolves any violations of privacy when other telephone calls, like those for nonprofit purposes, are exempt.

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[3] 441 U.S. 557 (1980). Of course these same principles **would** also apply to **any** state **do-not-call** lists

In addition. in fashioning such a list. the FCC must guard against over breadth in the telephone calls covered by the list and the potential for the inclusion, or continued inclusion. of telephone numbers on the list where consumers have not actually elected to have their telephone numbers placed on the list. The first problem can be addressed through appropriate exceptions, including appropriately defining the established business relationship and prior express invitation or permission exceptions in the TCPA, and the second problem can be addressed through appropriate list management procedures.

D. Alternatives to a National Do-Not-Call List

Nevertheless, any national do-not-call list will inherently be less reflective of actual consumer choices than the existing FCC rule under the TCPA where consumers opt out of receiving telephone calls from individual companies on a company-by-company basis, thereby assuring that they can continue to receive calls from others. For this reason, the FCC should at least consider whether its contemplated goals can be achieved through modifications to the current process for opting out on a company-by-company basis before the FCC commits to a national list applicable to telephone solicitations generally. In this regard, the company-specific do-not-call approach currently requires telemarketers to place a consumer on a do-not-call list if the consumer requests not to receive future telemarketing calls. These requests are typically received in response to individual telephone calls made to the consumer. An alternative might be to require telemaketers to provide a ready means by which they could be contacted orally. in writing or electronically, to have consumers' names placed on telemarketers' individual lists. A central list of those contact points might be maintained by the FCC and made available to those who wish to contact the telemarketers directly. Such a system would permit private sector organizations to intermediate between consumers and telemarketers by offering services of placing consumers names on the individual companies' lists. Competition may tailor such services to various consumer preferences and market discipline will help to ensure the integrity of the process. In such an arrangement, because the burden of making multiple requests would be reduced significantly for consumers, annual requests might be required, thereby mitigating some of the list management issues such as those related to consumers who move and do not retain their telephone numbers, subsequently discussed.

Additionally, if the FCC concludes that it should continue some version of the company-specific do-not-call lists, Visa believes that companies should not be required to provide consumers with access to their do-not-call lists, or to undergo the costs of affirmatively responding to individual requests for confirmation that their names have been placed on do-not-call lists. Any confirmation requirement would discourage companies from helping consumers to place their names on do-not-call lists because of increased costs that would accompany the process of responding to consumers' requests. Compliance with consumers' requests should be assumed. Companies will remain responsible if their failure to do so results in unwanted calls.

E. Exception for Established Business Relationship and Prior Express Invitation or Permission

The TCPA definition of "telephone solicitation" excludes a call to a person with an "established business relationship" with the caller or to any person based on a "prior express invitation or permission."[1] Currently, these exceptions apply to the company-specific do-not-call provision adopted by the FCC under the TCPA. Visa can perceive of no justification for not retaining these company-specific do-not-call provisions if a national list is established. Retention of the company-specific procedures will allow individuals to make do-not-call decisions on a case by case basis and permit them to opt out of certain calls rather than registering on a single national do-not-call list. The company specific requirement also can serve as a safety valve for a broad established business relationship exception.

In this regard, however, it may be appropriate to treat the exceptions differently when applied to the national list as opposed to the company-specific lists. For example. under the current FCC rule, a request not to be called that is directed to a specific company does not apply to the affiliates of that company. This result is appropriate for a company-by-company approach. However, if a national do-not-call list is established. as discussed more fully below, the established business relationship exception should also apply to affiliates.

These exceptions to the restrictions on the use of telephone solicitations in the TCPA should be defined broadly by any rule establishing a national do-not-call list. Broad exceptions are particularly important in light of the *Central Hudson* requirements discussed above. For example, it is essential that any national do-not-call list provide an exception to permit a financial institution and its affiliates to contact individuals with whom the financial institution has an existing business relationship. This exception also should extend to business partners, such as co-brand and affinity partners. For example. oftentimes, banks issue credit cards that carry names of other parties, including other banks, generally known as agent banks. The essence of financial services involves ascertaining a consumer's financial needs and finding or tailoring products to meet those needs. For regulatory reasons, these products may be provided by affiliates or partners of the entity with which the consumer originally dealt. Any national do-not-call list should not limit calls by affiliates and business partners that are required to be legally separate from the entity delivering the initial product or service to the consumer, particularly where these entities are identified to the consumer on a co-branded or coordinated basis.

The FCC also should clarify that the "prior express invitation or permission" exception is not limited in the form of the invitation or permission. The method of invitation or permission should be broad and should include both written or oral expressions, as well as the existence of a prior business relationship. For instance, if a

[1] 47 U.S.C. § 227(a)(3)

customer walks into a bank to apply for a loan, and the customer is then asked if he or she would like to receive information on insurance, and the customer responds in the affirmative, this oral response should suffice as prior express permission. The bank then should be able to give the customer's name to a provider of insurance so that the provider of insurance may call the bank customer. In this way. customers have the benefit of receiving telephone calls regarding insurance products for which they previously expressed permission.

Moreover, the prior express invitation or permission exception should apply until the customer revokes the expression of interest by requesting to be placed on the caller's company-specific do-not-call list. This will avoid arbitrary time limits that must be tracked by telemarketers and that may not reflect the seasonality or cyclicality of products or services.

F. List Management Considerations

Consistent with the requirements of ***Central*** *Hudson,* do-not-call list management issues, including the length of time that specific telephone numbers remain on a list, must be crafted carefully to avoid an overinclusive list. For example, if a telephone number is used by multiple consumers, whose choice to be placed on the list controls? In addition, if a consumer who has put his or her telephone number on the list moves or otherwise relinquishes that telephone number, the next consumer who is assigned that telephone number might not receive telephone solicitations that he or she wishes to receive if appropriate mechanisms are not in place to assure that that the national do-not-call list only contains valid and up-to-date records. A national do-not-call list needs to address methods for updating, verifying or removing names and telephone numbers from the list. Reregistration should be required for individuals who relocate or change telephone numbers. Also, the FCC itself recognizes that 20% of all telephone numbers change each year. As a result, listed numbers should remain on a national do-not-call list for no more than two years, thus insuring that consumers who inherit telephone numbers are afforded their own opportunity to choose to receive telemarketing calls if desired or to choose to be listed on the national do-not-call list.

In addition, a national do-not-call list raises privacy issues. Identifying individuals by name and telephone number may disclose unlisted telephone numbers, including, for example, the telephone numbers of individuals seeking to avoid abusive spouses. On the other hand, a list that merely includes telephone numbers will be difficult to reconcile with requests to be placed on or removed from the list. It may be possible to structure a publicly available list of numbers that is matched with names only on agency records; however, the legality of such a system under the Freedom of Information Act would have to be clearly established.

G. Predictive Dialers

The FCC should not unnecessarily restrict the use of predictive dialers. Predictive dialers provide a valuable service by materially reducing the cost of telemarketing. Individuals who receive telemarketing calls have chosen to receive such calls when they have **the** option of inclusion on a national do-not-call list or a company-specific list. Any residual problem from predictive dialers can be evaluated only after a national list has been implemented. If no such list is established, then any restrictions should consider the benefits to consumers from predictive dialers. Prohibiting the use of predictive dialers would increase the cost of goods and services that are telemarketed for those who have chosen to receive telemarketing calls, without providing those consumers with any corresponding benefits.

H. Wireless Telephone Numbers

If the FCC chooses to preclude telemarketing calls to wireless telephone numbers, it is essential that the FCC guarantee there is an effective means of restricting such calls to wireless telephone numbers.

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In conclusion, Visa appreciates the opportunity to comment on this important topic. If you have any questions concerning these comments, or if we may otherwise be of assistance in connection with this matter, please do not hesitate to contact me at (415) **932-2182,** or at rschrade@,visa.com.

Sincerely,

Russell W. Schrader

Russell W. Schrader
Senior Vice President and
Assistant General Counsel

cc: FCC Commissioners
FTC Commissioners